A CHILD'S VOICE AND CHOICE IN CUSTODY DISPUTES: A SEARCH FOR A STANDARD

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Although children are autonomous individuals with distinct and independent interests, they have generally been denied those rights requiring judgement. Hence, among other things, they cannot vote, contract or hold elective office. These rights of choice have been denied children because they are presumed to lack the capacity to either know the law or make enlightened and mature decisions. Due to this ostensible incapacity, courts tend to overlook the distinct and independent interests that children have in decisions affecting their future.

After there has been a natural or artificial disruption in the structure of the nuclear family, through a separation or the death of a parent, the psychological impact upon any child may be profound. In an ensuing custody dispute, the children, it may be said, become the injured and unwilling participants in the division of the family structure.

A court cannot overlook the child's "rights" when confronted by questions directly affecting the latter's familial relations. Otherwise, the great losers may be the children and ultimately, the society with which they interact.

INTRODUCTION

Statutes relating to child custody disputes are couched in such general terms that amount to little more than policy statements. A perusal of the pertinent provisions of the Civil Code of the Philippines and of the Child and Youth Welfare Code regarding custody awards, culminating in the present Family Code, show that the statutes are mere restatements of the basic principle recognized in most, if not all jurisdictions, that the material and moral welfare of the child is the paramount consideration. In cases, however, where the child is of tender years, the mother is presumptively regarded as the more suitable

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custodian. Therefore, other things being equal, courts tend to award custody to her also for the sake of the child's welfare.[1] Still, in other cases, where a child has reached a certain age, with sufficient discernment to make a choice, his or her preference of life with one parent or even with a third party is also given consideration.[2]

The basic principle which governs the determination as to which party will obtain custody of the child is so sweeping that the courts have a broad discretion to consider many factors in arriving at a judgement securing the best interests of the child. On numerous occasions, when the contest is between parents on one side and a third party, such as the child's grandparents, on the other, the courts have properly considered the natural right of the parents to the custody of their children as superior to all other factors. This is in consonance with the protection afforded by our Constitution to the integrity of the family unit which is recognized as the foundation of the nation.[3] In declaring that the solidarity of the Filipino family shall be strengthened by the state,[4] the Constitution evidently favors the maintenance of natural family relations and parental affection over the child. It may well be said that the thicker the blood, the stronger the bonds, and consequently, the deeper the filial love and commitment.

Article II, Section 12 of the present Constitution reiterates the mandate imposed on parents by the 1935 and 1973 Constitutions which states:

> The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution.... The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the government.

Among the rights that the father and the mother have over their children is the right to have them in their company.[5]

1 Civil Code of the Philippines, R.A. No. 386, art. 363 (1950) [hereinafter The Civil Code].

2 The Family Code of the Philippines, E.O. No. 209, art. 213 (1988) [hereinafter The Family Code].

3 PHILIPPINE CONST. art. XV, sec. 1.

4 *Id.*

5 The Family Code, art. 220.

Being the natural guardians of their minor children, the parents are correspondingly entitled to keep them in their company.[6] Parental authority and responsibility over the person and property of their children is a natural right and duty of parents[7] and both shall jointly exercise such over their common children.[8] Foremost among the rights of parental authority over the child is the right of parents to the company of their children and, in relation to all other persons or institutions dealing with the child's development, the primary right to provide for their upbringing.[9] Since the right of parents to the custody of their minor children is both a natural and legal right, the law should not disturb the parent-child relationship except for the most compelling reasons, and only upon gross misconduct or unfitness, or of other extraordinary circumstances affecting the welfare of the child.[10] This, in a nutshell, is the parental right doctrine. It is based on the universal concept that there is no substitute for the parent's love, care and guidance.

In *Luna v. Intermediate Appellate Court*,[11] the custody of the minor who grew up with her grandparents was being disputed by her parents. The Supreme Court ruled in accordance with the choice of the nine-year old child to live with her grandparents instead of her biological parents. The Supreme Court's decision was founded primarily on the manifestation of the child that she would kill herself or run away from home should she be separated from her grandparents.

Several questions have emerged as a result of the decision in the *Luna* case: Was the law on parental authority conveniently sidetracked?[12] Did the award of custody to the grandparents based primarily on the child's choice run counter to existing law and jurisprudence?[13] Was the award of custody in accordance with the best interests of the child?

A. Background of the Study

The Civil Code of the Philippines had scanty, if not very vague laws with regard to questions relating to the custody and care of children.

[6] *Aldecoa v. Hongkong Shanghai Bank*, 30 Phil. 228 (1915).

[7] The Family Code, art. 209.

[8] *Id.*, art. 211.

[9] The Child and Youth Welfare Code, P.D. No. 603, art. 43 (1975).

[10] 59 Am. Jur. 2d 107-108.

[11] 137 SCRA 7 (1985).

[12] *Luna v. IAC*, 137 SCRA at 17, Makasiar, J., *dissenting*.

[13] *Id.*

Article 90, which speaks of annulled marriages, provides that the court shall award the custody of the children as it may deem fit. Article 106, on the effects of legal separation, states that the custody of minor children shall be awarded to the innocent spouse. Otherwise, the court, in the interest of said minors, may appoint a guardian. Under Title XII on the Care and Education of Children, Article 363 decrees that in all questions regarding the care, custody, education and property of children, the latter's welfare shall be paramount. However, this is qualified by the rule that no mother shall be separated from her child under seven years of age unless the court finds compelling reasons for such a measure.

On December 10, 1974, the Child and Youth Welfare Code (P.D. 603) was enacted in observance of Human Rights Day. This was the same year that the UNICEF declared a global emergency for children. The decree recognized the child as one of the most important assets of the nation.[14] It served to codify the scanty and scattered laws on the rights and responsibilities of children.[15] However, the statute addressed the laws on custody disputes in very general, as did the Civil Code. Article 8 reiterates that in questions regarding the care, custody, education and property of the child, his welfare shall be the paramount consideration. Measures for the welfare of the child are embodied in Article 3 thereof which enumerates the rights of the child.[16]

According to Sec. 6, Rule 99 of the Revised Rules of Court, when husband and wife are living separately, and a question as to the care, custody and control of their children arises, it may be resolved by petition before the court or otherwise, as an incident to any other proceeding. Thereafter, the court, upon hearing testimony, shall award the care, custody and control of such child in accordance with his best interests. If the child is ten years of age or over, he shall be permitted to choose the parent he prefers to live with, unless the parent so chosen is unfit to take charge of the child by reason of moral depravity, habitual drunkeness, incapacity or poverty.

[14] P.D. No. 603, art. 1.

[15] Flerida Ruth P. Romero, *The Child and the Law*, 7 JOURNAL OF THE INTEGRATED BAR OF THE PHILIPPINES 25 (1979).

[16] Art. 3 of P.D. No. 603 provides,

> Every child has a right to wholesome family life; a well-rounded development of his personality; balanced diet, adequate clothing, sufficient shelter, proper medical attention; the right to be brought up in an atmosphere of morality and rectitude; to an education; and the right to grow up as a free individual.

On August 4, 1988, the Family Code came into effect and introduced important changes to the Civil Code and to the Child and Youth Welfare Code. However, with respect to the laws on custody disputes, nothing much was changed or added thereto, except for the novelty found in Article 213 thereof. This codified into substantive law the child's custodial preference and lowered the age from ten to seven. Article 213 provides that in case of separation of parents, parental authority shall be exercised by the parent designated by the court, taking into account all relevant considerations, especially the choice of the child over seven years of age, unless the parent chosen is unfit. The same article reiterates that no child under seven years of age shall be separated from the mother unless there are compelling reasons to order otherwise. The Family Code preserved the other provisions found in the Civil Code relating to custody awards. Article 63, paragraph 3 of the Family Code, as well as Article 106 of the Civil Code, provide that in case of legal separation, custody of the minor children shall be awarded to the innocent spouse.[17] On the other hand, in case of declaration of nullity or annulment of marriage, no preference is given to the innocent spouse. Article 50 merely provides that the final judgement in such cases shall provide for the custody and support of the common children among other things.

Custody embraces the sum of parental rights with respect to the rearing of a child, including his care. It includes the right to direct his activities and make decisions regarding his care, control, education, health and religion. It also includes the right to the child's services and earnings within the limitations provided by law.[18]

The broad terms and vague directives of the statutes regarding custody disputes and the foregoing definition of custody underscore the importance of the court's role in the resolution of issues involving the custody of the child. One writer has aptly remarked that the courts of justice have often been called upon to exercise Solomonic wisdom in awarding custody of the child to feuding parents.[19]

In private custody cases, courts must determine a weakly defined right: the welfare of the child; and judges are plagued by the same uncertain standard: the best interests of the child. What is the welfare of the child and what are his best interests as defined by our courts?

[17] Art. 63, par. 3 of the Family Code should be read together with art. 213 of the same Code.

[18] The Family Code, arts. 225-226.

[19] Romero, *supra* note 15, at 27.

B. Objective of the Study

As can be gleaned from the direction of this study, the writer aims to fulfill the following objectives:

1. To examine the effects of *Luna v. Intermediate Appellate Court* on the natural right of parents over their minor children.
2. To determine whether or not the doctrine in *Luna v. Intermediate Appellate Court* can still be applicable in the light of the provisions on parental authority in the Family Code.
3. To determine the best interests of the child as defined by Philippine Jurisprudence. This includes the search for concrete standards and specific guidelines in custody awards.
4. To reconcile *Luna v. Intermediate Appellate Court* with the doctrines governing the court's resolution on custody disputes.

C. Scope of the Study

The study will focus on the resolution that *Luna v. Intermediate Appellate Court* is still law, in harmony with Philippine Jurisprudence regarding custody awards, consistent with existing legislation, particularly the Family Code. The discussion on parental authority will be limited to that aspect of parental authority which has a bearing on the issue of child custody. Since as discussed earlier, there is no great variance on the laws governing custody disputes from the Civil Code of the Philippines to the present Family Code, the study shall examine cases dating as far back as 1907 in order to achieve its objectives.

However, as to the issue of whether or not *Luna v. IAC* is consistent with existing legislation on parental authority, only the Family Code will be examined since the latter has repealed the whole title on parental authority in the Civil Code and the important provisions on this subject in the Child and Youth Welfare Code.

D. Methodology

In fulfilling said objectives, the writer found it most useful to present a comprehensive analysis of Philippine Jurisprudence classified according to the particular factors affecting custody determinations and with references to the years they were decided. The cases

will be the basis for the search for concrete standards and specific guidelines in the resolution of custody disputes.

The study will not attempt to lay down any fixed formulas in such determinations. Rather, it is an examination of the trends set through the course of Philippine Jurisprudential history, such that *Luna v. IAC* will be proven to be in harmony with Philippine Jurisprudence and existing legislation.

The study will also make use of the comparative method in its analysis of the different provisions on child custody contained in the Family Code and the Civil Code of the Philippines. Likewise, with other statutes such as the Child and Youth Welfare Code and the Revised Rules of Court.

Whenever appropriate, reference will also be made to foreign laws and jurisprudence, supplemented by other legal publications and articles, both local and foreign.

I. PARENTAL RIGHT DOCTRINE

A. Concept of Parental Authority

Parental authority (*patria potestas*) is defined as "the mass of rights and obligations which parents have in relation to the person and property of their children, and even after this, under certain circumstances."[20] The concept of parental authority has evolved from being "the sum total of the rights of parents over the person and property of children" to one, which now includes the responsibilities of parents towards their children.[21] Due to the influence of Christian faith and doctrines, the Roman Law concept under which the offspring was virtually the chattel of his parents under the *jus vitae ac necis* (right of life and death), the concept of parental authority has evolved into a radically different institution.[22] Under the present concept of parental authority, the obligational aspect is supreme.[23]

[20] 4 ARTURO M. TOLENTINO, THE CIVIL CODE OF THE PHILIPPINES: COMMENTARIES AND JURISPRUDENCE 293 (1990).

[21] REYES AND PUNO, AN OUTLINE OF PHILIPPINE CIVIL LAW (1967), *quoted in* ALICIA SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES 292 (1991).

[22] *Id.*

[23] *Id.*

Puig Pena wrote:

> There is no power, but a task; no complex of rights, but sum of duties; no sovereignty but a sacred trust for the welfare of the minor.[24]

The Court in *Reyes v. Alvarez*[25] had occasion to say that:

> Parental authority... has for its purpose [the children's] physical development, the cultivation of their intelligence, and the development of their intellectual and sensitive faculties.

B. Law on Parental Authority

Before the Family Code became effective on August 3, 1988, the law on parental authority was the Child and Youth Welfare Code (P.D. 603) and all provisions of the Civil Code not inconsistent with the former law. The Family Code, however, has expressly repealed the whole title on parental authority found in the Civil Code and Articles 17, 18, and 19 on parental authority found in the Child and Youth Welfare Code.

Article 209, which opens the title on parental authority in the Family Code, emphasizes that parental authority and responsibility is the "natural right and duty of parents over the person and property of their minor children." It includes "the caring for and rearing of such children for civic consciousness and efficiency and the development of their moral, mental, and physical character and well-being." However, as in other cases, this right and duty is not absolute. The law has provided for exceptions under which parental authority may be terminated, suspended, or lost.

1. SUBSTITUTE PARENTAL AUTHORITY

The present law on substitute parental authority is now found in Article 214. It reads:

> In case of death, absence or unsuitability of the parents, substitute parental authority shall be exercised by the surviving grandparent. In case several survive, the one designated by the court, taking into account the same conditions mentioned in the preceding article, shall exercise the authority.

[24] 2 DERECHO CIVIL 153, *quoted in Medina v. Makabali*, 27 SCRA 502 (1969).

[25] 8 Phil. 723 at 725 (1907).

Article 216 expands on this concept. It provides:

> In default of parents or a judicially appointed guardian, the following persons shall exercise substitute parental authority over the child in the order indicated:
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> (1) The surviving grandparent, as provided in Art. 214;
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> (2) The oldest brother or sister, over 21 years of age, unless unfit or disqualified; and
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> (3) The child's actual custodian, over 21 years of age, unless unfit or disqualified.

As seen from the foregoing, in default of parents, the law has provided for an order of preference as to who will take the place of the former. The law calls first the grandparents; then the brothers and sisters; and lastly, the actual custodians who may or may not be relatives by consanguinity or affinity. The law presumes, and not unreasonably, that those with an ascendancy and are nearer in degree to the minor after the parents, are more likely to properly care for and pay greater attention to him. In applying this order of preference, the court must still take into account all relevant considerations, especially the choice of the child over seven years of age, unless the person chosen is unfit.[26] The Family Code has abolished the preference for the paternal grandparents over the maternal which was found in the Civil Code.[27]

Substitute parental authority is of a suppletory and exceptional nature. It arises only in the cases provided by law, that is, in case of death, absence, or unsuitability of the parents. It is also applied with due regard to the fundamental integrity of the family unit which has found protection in Article II, section 12 of the 1987 Constitution.

2. TERMINATION, SUSPENSION, AND DEPRIVATION

The Family Code speaks of termination, suspension, and deprivation of parental authority. These three consequences may be either permanent or temporary. The causes may either be with or without fault of the parent or parents concerned.

Parental authority terminates permanently because there is no possibility for revival. It may be terminated: (1) upon the death of the parents; (2) upon the death of the child; and (3) upon emancipation of the child.

[26] The Family Code, art. 213.

[27] The Civil Code, art. 355.

On the other hand, Article 229 speaks of termination which may subsequently be revived by final judgement. These are:

> (1) Upon adoption of the child;
>
> (2) Upon appointment of a general guardian;
>
> (3) Upon judicial declaration of abandonment of the child in a case filed for the purpose;
>
> (4) Upon a final judgement of a competent court divesting the party concerned of parental authority;
>
> (5) Upon judicial declaration of absence or incapacity of the person exercising parental authority.

In the cases above, parental authority may be revived by final judgement: (1) rescinding the adoption of the child; (2) terminating the judicial guardianship over the child; (3) restoring parental authority to the parent who has returned home after abandoning the child or who has been divested of parental authority for any other reason; (4) restoring parental authority to an absent parent who has returned; and (5) a formerly incapacitated parent who has regained his or her capacity.

Article 230 outlines another instance when parental authority is suspended temporarily. It reads:

> Parental authority is suspended upon conviction of the parent or the person exercising the same of a crime which carries with it the penalty of civil interdiction. The authority is automatically reinstated upon service of the penalty or upon pardon or amnesty of the offender.

Civil interdiction is an accessory penalty to the following principal penalties: (1) *reclusion perpetua* and (2) *reclusion temporal*.[28] *Reclusion temporal* has a duration of 12 years, 1 day to 20 years, while *reclusion perpetua* has a duration of 20 years, 1 day up to as much as 30 years.[29] In this case, the parent's parental authority is automati-

[28] The Revised Penal Code, Act No. 3815, art. 34 (1932).

[29] *Id.*, art. 27.

cally reinstated upon service of the penalty by, or upon pardon or amnesty of, the parent.[30] There is no need for a court order reinstating the parental authority of the parent over the child because it is automatically revived.[31]

Article 231 treats of both suspension and deprivation, depending on the seriousness of the cause. However, despite the distinction the law makes on the basis of the gravity of the ground imputed in both instances, the loss may only be temporary. The order, whether it be suspension or deprivation, can be revoked and the parental authority of the parent concerned can be revived. It provides:

> The Court in an action filed for the purpose or in a related case may also suspend parental authority if the parent or person exercising the same:
>
> (1) Treats the child with excessive harshness or cruelty;
> (2) Gives the child corrupting orders, counsel or example;
> (3) Compels the child to beg; or
> (4) Subjects the child or allows him to be subjected to acts of lasciviousness.
>
> The grounds enumerated above are deemed to include cases which have resulted from the culpable negligence of the parent or person exercising parental authority.
>
> If the degree of seriousness so warrants, or the welfare of the child so demands, the court shall deprive the guilty party of parental authority or adopt such other measures as may be proper under the circumstances.
>
> The suspension or deprivation may be revoked and the parental authority revived in a case filed for the purpose or in the same proceeding if the court finds that the cause therefore has ceased and will not be repeated.

The only instance when the law provides for permanent deprivation with no provision for reinstatement or revival is when the person exercising parental authority has subjected the child, or has allowed him to be subjected to, sexual abuse. In such a case, under Article 232, such person shall be permanently deprived by the court of parental authority.

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[30] ALICIA V. SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES 313 (1991).

[31] *Id.*

C. Parental Authority as Basis for Custodial Right

As earlier mentioned, parental authority is a natural right and duty of parents. The rights of the parent, founded on nature, are respected unless these rights have been abandoned, renounced, relinquished, or transferred in the cases expressly mentioned by law.[32] Foremost of the rights of parental authority over the person of the child is the right of parents to their company, for the child is theirs to care for and to rear.[33] The right of the parents to the company and custody of their minor children is one of the natural rights incident to parenthood. It is a right supported by law and sound public policy.[34] The right is an inherent one which is not created by the State or by the decisions of the courts. It emanates from the nature of parental relationship.[35] It is based on the universal concept that in the natural order of things, the natural love, affection, and guidance of parents over the child is in itself the best assurance of the child's welfare.[36]

D. Right of Parents as Against Others or the Parental Preferential Rule

In view of the foregoing, the parental right doctrine of parental preferential rule substantially holds that ordinarily, the custody of the child should be given to the parent.[37] The parent has a superior claim over all other persons if the parent is found to be fit to have custody of the child and can provide him with a proper home.

Similarly, where a parent applying for custody is in a position to care for the child and is not shown to be an unsuitable custodian, the court may not award custody to others merely because it feels that they are more fit to provide for the child. Under this view, the welfare or interest of the child is the paramount consideration. It is subject to the condition or qualification that a fit parent has a right to the custody of his child superior to the rights of others.

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[32] The Family Code art. 210.

[33] P.D. No. 603, art. 43.

[34] 31 ALR 3d 1197.

[35] *Id.*

[36] *Id* at 1191.

[37] 59 Am. Jur. 2d 160.

E. Jurisprudence Applying the Parental Preferential Rule

The line of cases involving the parental right doctrine begins with *Reyes, et.al. v. Alvarez.*[38] In this case, a girl had been living in the convent for thirteen years. She was two and a half years old when she started living there. The nuns, most especially the Mother Superior, were very fond of her and showered her with love and affection. They provided her with everything from food to education. Once a month or every two months, she would spend the day in her parents' house. The longest she stayed with them was fifteen days when her mother fell ill.

The parents who filed a petition for custody after the lapse of thirteen years were not denied by the Court the right to regain custody over their daughter. The Court ruled:

> There could not have been a waiver of parental rights, whether express or implied, since lack of compliance on the part of the father with the duties which the law imposes on him, cannot be construed to be a waiver or termination of the parental authority. Parental authority only ceases upon the means and grounds which the law itself provides. Should the father be proven as remiss in his paternal duties such as giving the children the education corresponding to their station in life, he will be properly dealt with and be liable under the penal law then in force.

In *Salvana and Saliendra vs. Gaela,*[39] the parents sought to recover custody of their fifteen-year old daughter who was then voluntarily in the custody of the Justice of the Peace. She sought refuge in the latter's house because she was being compelled by her parents to marry a man against her will. They refused to give their consent to her marriage to another young man with whom she eloped and by whom she was six months pregnant at that time.

The Court defined the extent and limits within which the courts may exercise their discretional power to deprive parents of their parental authority and custody over the child. The Court limited itself to the grounds provided by law for depriving parents of such authority. It found that neither the act of compelling their minor daughter to marry against her will nor the act of refusing to give their consent to her

[38] 8 Phil. 723 (1907).

[39] 55 Phil. 680 (1931).

marriage with another man is included in the grounds established by law for depriving parents of *patria potestas* and custody of their minor children.

The Court, however, made known its disapproval of pre-arranged marriages. Having said this, it went on to say that marriage should be based upon mutual love and sympathy, and that the absence of these basic foundations have led to so many failed marriages. However, to constitute a ground for depriving parents of *patria potestas* and custody of their minor children, the means employed must bring about moral and physical suffering on the child. Were those elements present in this case? Apparently not, as the Court said:

> The means employed are not such as to bring about moral and physical suffering, since it did not appear that the parents would go on insisting that she marry against her will on account of her present physiological condition.

The decision emphasized that the parents' refusal to consent to the marriage of their daughter to the man she loved and by whom she had become pregnant was not a ground under the law to deprive them of parental authority. The refusal was part of and parcel of the parental right and duty to offer guidance to the minor children. They, who "due to the incomplete development of their mind and intellectual faculties, and to their lack of experience in the world, need the counsel, care, and guidance of their parents in order to prevent the impulse of passion, excited by worldly illusions which their undeveloped intellectual faculties are not strong enough to overcome, from leading them to serious consequences."

A similar approach was followed by the Court in *Celis v. Cafuir.*[40] The petitioner Ileana A. Celis, unmarried, gave birth to a boy named Joel. The reaction of Ileana's father was one of anger and extreme displeasure because of the alleged disgrace she brought on herself and her family for having maintained illicit relations with a man to whom she had not been married. The father objected to having her son in the paternal home where Ileana was then living. Nine days after delivery, Joel was given by Ileana to the respondent Soledad Cafuir. Cafuir thereafter took him directly from the hospital to her house, ministered to his needs, and even employed a nurse to take care of him. Ileana visited her child every Saturday, bringing him milk, food, and money.

[40] 86 Phil. 554 (1950).

Two years later, when Ileana married her co-petitioner, Agustin C. Rivera, the couple sought custody of Joel.

The theory of the respondent was that Ileana renounced her parental authority over Joel evidenced by the two letters presented in Court. The Court believed there was no renunciation. It held that in the first document, she merely entrusted her son to Soledad because she did not have sufficient means to rear the child. The word "entrusted" cannot convey the idea of definite and permanent renunciation of the mother's custody. The second document merely designated Soledad as the "real guardian." Guardianship is always or almost invariably understood to be temporary.

Writing for the prevailing opinion, Justice Montemayor said:

> This court should avert the tragedy in the years to come of having deprived mother and son of the beautiful associations and tender, imperishable memories engendered by the relationship of parent and child. We should not take away from a mother the opportunity of bringing up her own child even at the cost of extreme sacrifice due to poverty and lack of means; so that afterwards, she may be able to look back with pride and a sense of satisfaction at her sacrifices and her efforts, however humble, to make her dreams of her little boy come true. We should not forget that the relationship between a foster mother and a child is not natural but artificial. If the child turns out to be a failure or forgetful of what its foster parents had done for him, said parents might yet count and appraise all that they have done and spent for him and with regret consider all of it as a dead loss, and even rue the day they committed the blunder of taking the child into their hearts and their home. Not so with a real natural mother who never counts the cost and her sacrifices, ever treasuring memories of her associations with her child, however unpleasant and disappointing. Flesh and blood count.

In these cases, the Court found no sufficient reason to intrude into and dismember the parent-child relationship. In the *Reyes* case, the natural and legal right of the parents over the child prevailed despite the voluntary surrender of the custody of the two-year old child to a third party for a period of 13 years. There was no question that the present custodian, the Mother Superior, was a suitable and qualified substitute. However, the strong presumption that the welfare of the child will best be served by restoring custody to the natural parents was not overcome by reasons compelling enough to terminate the parent-child relationship. The same is true in the *Salvana* case where the Court strictly applied the law and ruled that the acts of the parents were part and parcel of their right and responsibility to care for and exercise proper control over their children.

In *Celis,* it was shown that a parent who, having been compelled by unfavorable circumstances or poverty to surrender the child, will not be denied the right to reclaim custody when her status has improved. The reason being, no one should begrudge sympathy from a mother who gave up the custody of her child by force of inexorable necessity or circumstances beyond her control. Again, this evinces that the right of the parent to the custody of the child as against one who is not a parent is so moving that the courts will not disturb the parent-child relationship unless there are factors which substantially affect the child's welfare.[41]

II. BEST INTEREST OF THE CHILD DOCTRINE

A. Concept

Article 1 of the Child and Youth Welfare Code reads:

> The Child is one of the most important assets of the nation. Every effort should be exerted to promote his welfare and enhance his opportunities for a useful and happy life.

The law would be fulfilling its highest mission if it were to inspire and encourage further efforts to make the child's world more secure and tranquil.[42] After all, a child's present happiness and well-being determines to a great extent his success in adult life. It is worth stating that his happiness and well-being begins at home. Hence, the child has the right to the best available home environment in the company of the persons constituting the home.[43]

In contrast to the parental right doctrine, the "best interest of the child" doctrine holds that in awarding custody of children, the primary test to be applied is the child's welfare and interest.[44] In other words, the welfare of the child is the chief consideration. As has been stated, the welfare of the child is "the polar star" by which the court's discretion must be guided, and to which all other rules, including the parental preferential rule, are secondary and, if in conflict, the latter must yield.[45]

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[41] *Supra* note 37, at 163.

[42] Romero, *supra* note 15, at 38.

[43] *Supra* note 16.

[44] 59 Am. Jur. 2d 164.

[45] *Id.*

B. Exceptions to the Parental Preferential Rule

The inherent, natural, and superior right of parents to the custody of their children is not absolute. Whenever a custody dispute arises, the courts must realize that such is not an ordinary suit, but a litigation over the welfare and custody of the child in which the State has a paramount interest.[46] The Courts must take into consideration all the circumstances of each particular case and adjudicate the custody of the children in a manner best calculated to secure the proper care and attention[47] of the children.

Thus, Justice Barredo speaking for the Court in *Unson v. Navarro*[48] stated:

> It is axiomatic in Our jurisprudence that in all controversies regarding the custody of minors, the foremost consideration is the physical, educational, social and moral welfare of the child concerned, taking into account the respective resources and social and moral situation of the parties. Never has the Court diverted from that criterion.

C. Best Interest as Basis for Custodial Determination

In the case of *Flores v. Vda. de Esteban*,[49] Esteban S. Flores was married to Adoracion Esteban. They had a son named Reynaldo. Seven years after Reynaldo was born Adoracion died. Mother and son had been living with the maternal grandmother from the very start since the father was working abroad. The maternal grandmother had been taking care of Reynaldo since he was twenty days old, although it is not disputed that both the father and paternal grandfather would every now and then give financial support. The father sought to recover custody of Reynaldo from his maternal grandmother. The Court denied the recovery by the father and defended the best interest of the child using the following words:

[46] Benjamin N. Henszey, *What is the Best Interest Doctrine?*, 16 JOURNAL OF FAMILY LAW 213 (1977-78).

[47] *Id.*

[48] 101 SCRA 183 at 189 (1980).

[49] 97 Phil. 439 (1955).

> In the present case what will be for the best interest of the child? It should be considered that the maternal grandmother is almost a mother to the child having taken care of him since he was twenty days old up to now, and feels the love of a mother for him. Since the death of the mother Adoracion, the respondent has acted as the mother of the child. There exist mutual love between the grandmother and the child. Her affection is as great or even greater than that of the mother herself. This is in accordance with human nature.

In *Medina v. Makabali*[50], Zenaida Medina gave birth to the child whose custody was being contested. The child was the third she had with a married man. The mother left the boy since birth with Dra. Makabali who treated and reared him as her own until he was five years old. Zenaida never visited him nor in any way contributed to his support during this period.

The Court, in denying the mother's right to the custody of her five-year old son, relied primarily on the boy's testimony on the witness stand. He hardly knew his natural mother. He called Dra. Makabali his "Mammy". When asked by the Court with whom he preferred to stay, he would shout "Mammy!" and point to Dra. Makabali.

Aside from the child's testimony, the Court found other reasons to deprive the mother of custody even if the child was only five years old. The Court said:

> As remarked by the court below, petitioner Zenaida Medina proved remiss in the discharge of her parental duties; she not only failed to provide the child with love and care but actually deserted him, with not even a visit, in his tenderest years, when he needed his mother the most. It may well be doubted what advantage the child would derive from being coerced to abandon respondent's care and love to be compelled to stay with his mother and witness her irregular menage' a trois with Casero and the latter's lawful wife.

The trial disclosed that the petitioner was living with a married man and their two other children, apparently with the tolerance of the man's lawful wife.

The case of *Chua v. Cabangbang*[51] succinctly illustrates that the welfare of the child is the chief consideration to which even the parents'

[50] 27 SCRA 502 (1969).

[51] 27 SCRA 791 (1969).

superior, primary, natural, and legal right must yield. In this case, the natural mother, Pacita Chua, filed a petition for *habeas corpus*, praying that the court grant her custody of and recognize her parental authority over her daughter, Betty Chua, christened as Grace Cabangbang. The lower court denied the petition and ruled that it would be for the welfare of the child to remain with her actual custodians, the Cabangbangs. In her appeal, Pacita Chua relied on Article 363 of the Civil Code, which provides that a mother cannot be separated from her child who is less than seven years of age, and on Article 332 of the same Code, which provides the grounds for the termination, loss, suspension, or deprivation of parental authority. She averred that the reason given by the lower court for denying her petition was not one of the grounds found in the law. The petitioner further assailed as illegal and without basis the award of custody to the Cabangbangs upon the ground that the couple is not related by consanguinity or affinity to the child.

The Court said her reliance on Article 363 is now moot and academic because the child is already 11 years old. The Court, however, agreed with her that the reason relied upon by the lower court, "that petitioner is not exactly an upright woman," is not, strictly speaking, a proper ground in law to deprive a mother of her inherent right to parental authority over her child. In the same breath, the Court nevertheless affirmed the judgement of the lower court. It said:

> There are indeed valid reasons for depriving the petitioner of parental authority over the minor Betty Chua or Grace Cabangbang. The record yields a host of circumstances which, in their totality, unmistakably betray the petitioner's settled purpose and intention to abandon and completely forego all parental responsibilities and forever relinquish all parental claim in respect to the child.

To the Court's mind, what is this host of circumstances? It said:

> She surrendered the custody of her child to the Cabangbangs in 1958, when she was only a few months old. She waited until 1963, or after the lapse of a period of five long years, before she brought action to recover custody. Her claim that she did not take any step to recover her child because the Cabangbangs were powerful and influential, does not deserve any modicum of credence. A mother who really loves her child would go to any extent to be reunited with her. The natural and normal reaction of the petitioner – once informed, as she alleged, that her child was in the custody of the Cabangbangs – should have been to move heaven and earth, to use a worn-out but still respectable cliche, in order to recover her. Yet she lifted not a finger.

With respect to petitioner's third argument, the Court pointed to sections 6 and 7 of Rule 99 of the Rules of Court. Under the said rule, the Court stated, "if it is for the best interest of the child, (the Court) may take the child away from its parents and commit it to, *inter alia*, a benevolent person."

Furthermore, the Supreme Court found the petitioner's inconsistent demands in the course of the proceedings in the lower court very significant. The gist of her testimony under oath was that she wanted the child back so that the alleged father could resume providing her with support. She also expressed her willingness for the child to remain with the Cabangbangs provided the latter would, in exchange, give her a jeep and some money. These circumstances reveal "that her motives do not flow from the wellsprings of a loving mother's heart. (On) the contrary, they are unmistakably selfish, even mercenary. She is only using the child as a leverage to obtain financial and other material concessions from the alleged father or the Cabangbangs."

Twenty years later, the same modus operandi of "give me money or give me back my child" took place in *Cervantes v. Fajardo*.[52] At issue was who had the right to the custody of Angelie Anne Cervantes barely a year old at that time. The parties involved were the adoptive parents on the one side and her natural mother on the other, who claimed that she did not consent to the adoption. Although the minor was legally adopted with the full knowledge and consent of the natural parents, the Court only mentioned this in the last paragraph of the decision immediately preceding the dispositive portion. It would have been easy for the Court to state outright that since the child was legally adopted then, "a decree of adoption has the effect, among others, of dissolving the authority vested in natural parents over the adopted child in favor of the adoptive parents."[53] Instead, the Court first reiterated that "in all controversies regarding the custody of minors, the foremost consideration is the moral, physical, and social welfare of the child, taking into consideration the resources and moral and social standing of the contending parents." Next, it compared the two sets of contending parents in order to vitalize the concept that the best interest and welfare of the child is the chief consideration. It found that the child's natural father, Conrado Fajardo is legally married to

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[52] 169 SCRA 577 (1989).

[53] The Family Code, art. 189.

a woman other than her natural mother, Gina Carreon. It also found that Gina had previously given birth to another child by a married man who eventually abandoned them. According to the Court, these circumstances "will not accord the child that desirable atmosphere where she can grow and develop into an upright and moral-minded person." On the other hand, the adoptive parents who are legally married "appear to be morally, physically, financially, and socially capable of supporting the minor and giving her a future better than what the natural mother can most likely give her."

Once again, child welfare was an overriding consideration in the custodial award as shown in the case of *Luna, et al. v. Intermediate Appellate Court*.[54] The decision reiterated the principle that in all questions relating to the care, custody, education, and property of the children, the latter's welfare is paramount. According to the Supreme Court, this means that the best interest of the minor can override even the natural, legal, and superior rights of parents to the custody of their children.

The facts show that when Shirley Salumbides Santos was two or four months old, her parents turned her over to the care and custody of her grandfather and step grandmother. Five years later, Shirley's natural parents sought to regain custody. The lower court ruled in favor of the grandparents but the Intermediate Appellate Court reversed and the Supreme Court affirmed the reversal in a minute resolution. However, during the period for the execution of the judgement, the grandparents filed a motion for reconsideration of the order of execution and to set aside the writ of execution. It was alleged that "on the ground of supervening events and circumstances, more particularly, the subsequent emotional, psychological and physiological condition of the child, the enforcement of the judgement would be unduly prejudicial, unjust, and unfair, and cause irreparable damage to the welfare and interests of the child." After the lower court denied the motion to set aside the writ of execution and after the Intermediate Appellate Court denied a petition for certiorari and prohibition with preliminary injunction, the matter was elevated to the Supreme Court on a petition for review on certiorari. The Supreme Court gave due course to the petition as an exception to the procedural rule that it is the duty of lower courts to enforce a final and executory decision

[54] 137 SCRA at 7.

of appellate courts. The Court explained that the welfare and best interest of the child can override procedural rules.[55]

The Court also declared that:

> The courts can do no less than to respect, enforce and give meaning and substance to the choice of a minor in a case where her very life and existence is at stake and she is in an age when she can exercise an intelligent choice, in order to uphold her right to live in an atmosphere conducive to her physical, moral and intellectual development.

It appears that when the grandparents filed a motion for reconsideration of the order and a motion to set aside the writ of execution on the ground of supervening events, the judge called a conference among the parties and their counsels. The judge conducted hearings on the motions filed by the grandparents. A portion of Shirley's testimony, who was by then already nine years old, during one of the hearings is quoted hereunder:

Q : Would you want to live with your mommy and daddy? (Referring to her biological parents)

A : No, sir.

Q : Why not?

A : Because they are cruel to me. They always spank me and they do not love me. Whenever I am eating, they are not attending to me. It is up to me whether I like the food or not.

xxx xxx xxx

Q : Now, if you will be taken from your mama and papa (the grandparents) and given to your mommy and daddy, what would you do if you will do anything?

A : *I will either kill myself or I will escape.* Even now they said they love me. I don't believe them. I know they are not sincere. They are only saying that to me. I know those words were not coming from their hearts. If they will get me from my mama and papa, they will be hurt because they know that my mama and papa love me very much. [italics supplied]

[55] Generally, when a judgment of a higher court is returned to the lower court, the only function of the latter is ministerial: that of ordering its execution The lower court cannot vary to mandate of the superior court nor intermeddle with it further than to settle so much as has been demanded. The court pointed out, however, that a stay of execution of a final judgment is authorized whenever it is necessary to accomplish the ends of justice, as when there had been a change in the situation between the parties which makes such execution inequitable.

The Supreme Court respected the choice of the child to live with her grandparents instead of her biological parents in order to uphold her right to live in an atmosphere conducive to her physical, moral, and intellectual development. Aside from Shirley's testimony, it was pointed out by the child psychologist who examined her that she was bitter towards, while at the same time, cautious and distrusting, of her biological parents. Correspondingly, the Supreme Court declared that to return her to the custody of her parents to face the same environment she complained of would be indeed traumatic and would result in irreparable damage to her.

In the cases of *Flores, Medina, and Luna,* where the children were cared for by non-parents for a substantial period of time and had developed strong ties of love and respect with the latter, the severance of such might be detrimental to the child. The Court found it in the best interests of the child to leave him or her where he or she was than to restore custody to a natural parent, even if not found to be unfit. The Court also took into consideration the fact that the nonparents have assumed the proper care, attention, and guidance over the child as compared to the parent.

On the other hand, in *Chua* and *Cervantes,* the court found circumstances which affirmatively show that the parent is unfit to have custody of the child. In *Chua,* the natural parent was found to have abandoned the child and consequently relinquished her parental rights. In *Cervantes,* the Court found facts showing inability to care for the child and other extraordinary circumstances, such as the parent's sexual and moral conduct. In both of these cases, the Court also examined the reasons the natural parents were seeking to recover custody of the child.

III. CHILD'S CUSTODIAL PREFERENCE

It has been said that children have long been a "neglected and ignored group, mute but not voiceless, bereft of political power and more of a consumer than a producer."[56] They are "a majority suffering the discriminations of the minority."[57]

[56] Romero, *supra* note 15, at 30.

[57] *Id.*

In custody disputes, if the child is old enough to form an intelligent judgement about his own custody, his choice will be given weight by the courts. Two questions must be posed at this juncture. When is the child entitled to be consulted? Having been consulted, how much weight do the courts give to the wishes of the child?

Before the Family Code, Section 6, Rule 99 of the Rules of Court provided that the appropriate age was ten years and above. At present, under Article 213 of the Family Code, the appropriate age is seven years and above. However, as already seen in the cases of *Medina v. Makabali* and *Luna v. IAC,* the age requirement is not strictly followed by the courts. In *Medina,* the child who was as young as five years was consulted, inasmuch as the court looked at the apparent intelligence of the child, rather than his age. In *Luna,* which was decided before the Family Code took effect, the nine-year old child was also consulted and the Supreme Court ruled in accordance with her choice to live with her grandparents rather than her parents.

An examination of the following cases will shed light on the question of how much weight the courts accord to a child's custodial preference.

In *Garcia v. Pongan,*[58] Maximino Garcia and Patrocinia Pongan had a child named Teonila Garcia. She was conceived and born to parents who were not legally married but who were capacitated and free to marry each other. Maximino filed a petition for *habeas corpus* to recover the custody of Teonila. After the hearing, the lower court denied the petition and awarded the custody of Teonila to Patrocinia. The Supreme Court affirmed the judgment of the lower court. It said:

> As the minor Teonila Garcia is over ten years and prefers to live with her mother, the court did not err in awarding to her the care, custody, and control of said minor, there being no showing that she is unfit to take charge of the child by reason of moral depravity, habitual drunkeness, incapacity, or poverty, in accordance with the provision of section 6, Rule 100 of the Rules of Court.

The child's custodial preference, as embodied then in section 6, Rule 100 of the Rules of Court, was once again recognized in *Lacson v. San Jose-Lacson.*[59] Alfonso Lacson and Carmen San Jose-Lacson were

[58] 89 Phil. 797 (1951).

[59] 21 SCRA 837 (1968).

married and had four children. After ten years of marriage, the spouses succeeded in reaching an amicable settlement respecting custody of the children, support, and separation of property. In a joint petition filed embodying their amicable settlement, the spouses agreed, among other things, that the custody of the two elder children, Enrique and Maria Teresa be awarded to the father, while the custody of the younger children, Gerard and Ramon, be awarded to the mother. The lower court approved their agreement. Thereafter, the mother, Carmen San Jose-Lacson, questioned the validity of the compromise agreement in connection with the custody of Enrique and Maria Teresa who, being both below seven years of age, should not be separated from their mother. She prayed that she be relieved of the agreement and that custody of the children be awarded to her.

The Court said that because five years have elapsed since the filing of these cases, the ages of Enrique and Maria Teresa would now be 10 and 11, respectively. Therefore, the issue regarding the award of the custody of the two children has become moot and academic. Nevertheless, the Court did not uphold the couple's agreement regarding the custody of the children and remanded the case to the lower court for further proceedings. The Court said that "courts must step in to determine in whose custody the child can better be assured the rights granted to him by law. The need, therefore, to present evidence regarding this matter, becomes imperative. A careful scrutiny of the records reveals that no such evidence was introduced in the CFI. The latter court relied merely on the mutual agreement of the parents. To be sure, this was not a sufficient basis to determine the fitness of each parent to be the custodian of the children.

The Court then etablished the child's preference as a factor in custody determinations. It said:

> At least one of the children, Enrique, the eldest, is now eleven years of age and should be given the choice of the parent he wishes to live with. This is the clear mandate of sec. 6, Rule 99 of the Rules of Court.

However, in *Slade Perkins v. Perkins*,[60] even when the child expressed a preference to stay with her mother, the father was given custody of the child. The reason was that the mother was shown to be an unfit custodian.

[60] 57 Phil. 217 (1932).

In *Luna v. IAC*, the Supreme Court's decision was founded primarily on the manifestation of the child that she would kill herself or run away from home should she be separated from her grandparents. The decision made reference to the child's testimony that "her parents were cruel to her," that "they spanked her and did not attend to her while she was eating." It may be argued that there was no actual search or a statement of specific findings in the decision of the unfitness of the parents to defeat their natural right to the custody and company of their child.

It can further be argued that as seen in the *Perkins* ruling, a child's wishes are merely persuasive and the court shall exercise its discretion for the welfare of the child. At the outset, her testimony could be dismissed as a temper tantrum of a child who grew up pampered by her grandparents in the midst of affluent surroundings. However, after more careful scrutiny, her testimony sounds off an alarm, as it did to the Court, which consequently treated it as an exceptional cause to override procedural rules and the natural right of parents. The Court feared that her threats may be for real.

Her wishes, as opposed to the legal rights of the parents, were particularly persuasive in determining custody since the parents voluntarily allowed her, from the time she was two months old until she was five years old, to remain with her grandparents.[61] She was reared by her grandparents for a substantial period and both had developed strong ties toward one another.[62] Applying the best interest doctrine, it may benefit her more to remain where she is and has been most of her life, than to restore custody to her natural parents even if they appear to be suitable custodians.

As stated earlier, to ensure the best interest of the child, the power of the State transcends the right of the natural parents to the extent that they can be denied custody of their child.[63] As in this case, where the parents permitted their child to remain with a non-parent for an extended period of time, they can be denied the right to regain custody even without regard to fault, if the disruption of the child's existing custody will not be in the child's interest.[64] Verily, when a child has

[61] *Supra* note 10.

[62] *Id.*

[63] *Id.* at 165.

[64] *Supra* note 10.

been reared by a non-parent from a tender age, the emotional shock of transferring him to an unfamiliar environment and severing ties with his foster parents militates against an award to the parent.[65]

Indeed, the child's wishes are not controlling but merely persuasive and the court shall exercise its discretion for the welfare of the child. It may be given greater weight depending on the age, intelligence, and discretion of the child to exercise an enlightened judgement concerning his own welfare. The weight given to the child's custodial preference is not an inflexible rule if it is to remain faithful to the purpose for which it was enacted, that is, to secure the welfare and best interest of the child.

It may be said that the reason the child is consulted is not because he has a legal right to demand that his wishes be respected. Rather, he is given a choice in order to help the Court arrive at a better understanding of what is in the best interests of the child. In consulting the child, the Court is in a better position to exercise its discretion wisely.[66] In the process, the child's right as an individual is given more tangible protection as he is given an opportunity to participate in legal matters affecting his life.

IV. TENDER YEARS RULE

The Civil Code specifically commands in the second sentence of Article 363 that:

> No mother shall be separated from her child under seven years of age, unless the court finds compelling reasons for such measure.

This is the so-called Tender Years Rule or the Maternal Preferential Rule. Under this rule, the mother is presumptively regarded as the more suitable custodian, and therefore, other things being equal, custody is awarded to her. This is based on the societal presumption that a mother is more equipped by nature and by society to care for children.[67]

[65] *Id.*

[66] *Supra* note 34.

[67] *Id.* at 156.

This rule was applied in *Lacson v. San Jose-Lacson* where the Supreme Court agreed with the Court of Appeals that the lower court erred in depriving the mother of the custody of the children who were both below the age of seven.

The rationale of this provision was explained by the Code Commission thus:

> The general rule is recommended in order to avoid many a tragedy where a mother has seen her baby torn away from her. No man can sound the deep sorrows of a mother who is deprived of her child of tender age. The exception allowed by the rule has to be for 'compelling reasons' for the good of the child: those cases must indeed be rare, if the mother's heart is not to be unduly hurt. If she has erred, as in cases of adultery, the penalty of imprisonment and the (relative) divorce decree will ordinarily be sufficient punishment for her. Moreover, her moral dereliction will not have any effect upon the baby who is as yet unable to understand the situation.[68]

V. CONSIDERATIONS IN CUSTODY DISPUTES

A. Role of Courts

The judiciary acting pursuant to its role as a branch of government, as *parens patriae*, possesses the power to determine the fitness of the parents or other parties seeking custody of a child.[69] With the appearance of new forces and the loss of old mandates, judges must now seek to determine the most effective way to follow the vague directives of the laws on custody disputes.[70] However, it may be said that the broad general principles which have controlled custody awards through the years have allowed for gradual change which, by and large, quite faithfully reflect the attitudes of society in regard to the parent-child relationship.[71] In the same vein, these broad general principles allow the court sufficient discretion to determine each case according to its own circumstances.

[68] REPORT OF THE CODE COMMISSION, *quoted in Medina*, 27 SCRA 502.

[69] Wallace J. Mlyniec, *A Role in Search of a Standard*, 15 JOURNAL OF FAMILY LAW 5 (1976-77).

[70] *Id.*

[71] *Supra* note 34.

On the role of courts, Justice Villareal speaking for the Court in *Salvana and Saliendra v. Gaela*[72] said:

> It is true that the well-being of the children should be carefully guarded by the courts; but they should remember that the law has been enacted also with this end in view. And, while the courts are in the line of duty in exercising the utmost vigilance in protecting children in all their rights and from suffering any injury whatever, yet this care should be exerted here in the manner pointed out by our Code; and it is the duty of the courts, in this as in all other cases, to track the law.

B. Particular Factors Affecting Custody Determinations

In custody determination, the courts need more than just the concrete guidelines of the "parental preferential rule" and the "best interest doctrine" to reach the ultimate goal of securing the welfare and interests of the child. Courts also rely on what may be called secondary rules which relate to particular factors affecting custody conflicts.

As earlier discussed, courts must take into consideration the child's custodial preference unless the parent chosen is unfit. In addition, courts are commanded to keep the mother and the child under seven years of age together, except for compelling reasons. What factors do courts look into to determine unfitness? What circumstances are considered compelling reasons to overcome the maternal preferential rule?

From this survey of Philippine decisions, one can draw a number of factors and elements frequently referred to by the courts affecting their determination in a particular case. The factors considered by the courts relate to traditional proof of the fitness of the contending parties to have custody of the child. The moral character, emotional stability, and conduct of the contending parties determine their fitness. These also include income, economic, and home conditions. The Courts also take into consideration the love, affection and attachment that exists between the child and the parent or whoever seeks the custody of the child.

[72] *Salvana and Saliendra v. Gaela*, 55 Phil. at 686.

1. MORAL CHARACTER AND EMOTIONAL STABILITY

Courts compare the moral character, emotional stability, and conduct of the parties to determine their relative fitness to care for the child. This comparison is based on the consideration that the child has the right to be brought up in a wholesome environment for the promotion of his health and the development of his desirable traits and attributes.[73] The child has a right to grow in an atmosphere of morality and rectitude for the enrichment and strengthening of his character.[74]

What circumstances militate against the finding of the Court that a party is morally and emotionally fit to have custody of a child?

In *Slade Perkins v. Perkins*,[75] custody of the child was awarded to the father instead of the mother because of the latter's conduct which was considered morally depraved. There were two circumstances that brought into question her fitness. First, while the litigation was pending, the husband discovered a bundle of letters written to the mother by a young man. The Court had this to say:

> These letters show that appellant was guilty of infidelity to her husband... However, an *act of infidelity so many years ago would not be conclusive at this time* as to the moral fitness of a mother to the custody of a minor daughter. The *treasuring of such erotic letters does, however, throw some light upon the mental and moral state of mind of the appellant.*

It is worth stating at this point that Justices Malcolm and Imperial strongly dissented as to the partial rejection of the finding of marital infidelity. According to them, it should have been entirely disregarded, "considering the lack of basis in certain letters written over ten years ago to establish the present unfitness of the mother for the duties of motherhood."

The second fact which fully supports the finding of moral depravity is the alleged perjury committed by the plaintiff. The Court said:

> In order to attain her own ends she went as far as to make statements absolutely contrary to the truth; and while testifying before the lower court on the trial of this incident she could not but reveal

[73] P.D. No. 603, art. 3.

[74] *Id.*

[75] 57 Phil. at 217.

how unscrupulous she is by stating one thing for another notwithstanding the fact that she was testifying under oath.[76]

It mystifies this writer how this perjury resulted in such a harsh and disproportionate penalty of depriving her of her daughter's custody. Could this not have been just part of a mother's overzealous effort not to lose her daughter? This writer agrees with the dissenting opinion that "considering the mother's frame of mind in a case of this character," which only transpired during the litigation itself, "it is very much doubted if exaggerated testimony establishes the moral depravity contemplated by law."

The Report of the Code Commission on the meaning of "compelling reasons" was quoted in part in the *Lacson* ruling. It provides:

> The exception allowed by the rule has to be for 'compelling reasons' for the good of the child: those cases must indeed be rare, if the mother's heart is not to be unduly hurt. If she has erred, as in cases of adultery, the penalty of imprisonment and the (relative) divorce decree will ordinarily be sufficient punishment for her. Moreover, her moral dereliction will not have any effect upon a baby who is as yet unable to understand the situation.

The case of *Chua v. Cabangbang*[77] followed suit in consonance with the *Lacson* ruling. The petitioner, Pacita Chua, was a hostess by profession. She had sexual liaisons with different men without the benefit of marriage. As a result, she had a number of children by different men. The trial court denied her petition to recover custody of one of her children because she was "not exactly an upright woman." The Supreme Court while affirming the judgement of the lower court, did not do so on the ground upon which the judgement of the lower court was premised, that is, that Pacita Chua "was not exactly an upright woman." The Court said that, "strictly speaking, this was not a proper ground in law to deprive a mother of her inherent right to parental authority over her child."

The conduct of the petitioner that was more repulsive to the Court was the fact that she was using the child as leverage to obtain financial

[76] She testified under oath that her husband had gone to live in the Army and Navy Club. She said he had gone to Europe and America for four months without having written to her even once. She said he authorized her to encourage in stocks speculation in New York. All of these were found to be untrue.

[77] 27 SCRA 791.

concessions either from the alleged father or the Cabangbangs. The Court said:

> The most unkind cut of all is that she signified her readiness to give up the child, in exchange for a jeep and some money.

This conduct coupled with the other circumstances cited by the Court on the part of the petitioner showed, without a doubt, her intention to completely forego all parental responsibilities and forever relinquish all parental claims with respect to the child.

Decided in the same year was *Medina v. Makabali*,[78] where the Court did not depart from the principle laid down in *Lacson* and *Chua v. Cabangbang* regarding the effect of the moral fitness of a parent. Nevertheless, the Court doubted in an obiter, "what advantage a child could derive from being coerced to stay with his mother and witness the latter's irregular *menage a trois* with her common-law husband and his legitimate wife."

Eleven years later, the Court made a complete turnaround regarding the moral fitness of a parent in *Unson v. Navarro*.[79] The mother was granted no more than visitorial rights over her daughter on the ground that she was living with her brother-in-law after her separation from her husband. The Court reasoned out that:

> It is in the best interest of the child to be freed from the obviously unwholesome, not to say immoral influence, that the situation in which the mother has placed herself, might create in the moral and social outlook of Teresa who is now in her formative and most impressionable stage in her life.

In this case, there was nothing in the decision to show that the mother is not presently a fit and capable custodian for the child, or that she is unable to properly care for the child. The mother's illicit relations with her brother-in-law was construed by the Court to have a significant impact on the well-being of the child so as to justify the deprivation of a parent's custodial right. However, this may be the qualification envisioned by the *Lacson* ruling since as the *Unson* decision pointed out, the child was now in the most impressionable stage of her life. She is no longer the "baby who is as yet unable to understand the situation" referred to in the *Lacson* ruling.

[78] 27 SCRA at 502.

[79] 101 SCRA 183 (1980).

The moral character of the parent went full circle in *Cervantes v. Fajardo.*[80] The Court, instead of focusing and limiting itself to the subsisting and valid decree of adoption as the sufficient cause to terminate parental authority and deny the custodial right of the natural mother, assessed the moral unfitness of the latter. The Court said:

> The common-law husband-and-wife relationship will not accord the minor that desirable atmosphere where she can grow and develop into an upright and moral-minded person. Besides, respondent Gina Carreon had previously given birth to another child by another married man with whom she lived for almost three (3) years but who eventually left her and vanished. For a minor (like Angelie Anne C. Cervantes) to grow up with a sister whose "father" is not her true father, could also affect the moral outlook and values of said minor.

It is noteworthy that the *Lacson* and *Unson* decisions made a distinction between a child in the most impressionable stage of her life and one who is still too young to distinguish between right and wrong, in gauging the impact of the moral environment on the child. No such distinction or qualification was made in *Cervantes.*

In *Unson,* the girl was already nine years old, thus, at an age where "she could have her own correct impressions or notions about the unusual and peculiar relationship of her mother with her own uncle-in-law, the husband of her mother's sister." In the *Cervantes* case, the child was less than a year old and certainly "one who is still too young to distinguish between right and wrong" as contemplated in *Lacson* and *Unson.*

From the tenor of the *Cervantes* decision, it would seem that even without the decree of adoption which was only mentioned in passing, the Court would have still granted actual custody in favor of the Cervantes spouses and not the natural parents. For the Cervantes spouses as opposed to the Fajardos "were legally married and appear to be morally, physically, financially, and socially capable of supporting the minor and giving her a future better than what the natural mother can most likely give her."

2. INCOME AND OTHER ECONOMIC CONDITIONS

The line of cases involved in this study shows that income and other economic advantages are not controlling. It is enough that the child's needs are adequately provided for. Affluence or poverty are not to be considered alone in the well-being of children.

[80] 167 SCRA 577 (1989).

Thus, the Court said in *Celis*:

> Whether a child should stay permanently with a kindly stranger or with his own mother, is not to be determined alone by considerations of affluence or poverty. Poor youths who had to work their way thru school and college, have, not infrequently, scaled the heights of success, as easily and swiftly as their more favored companions, and done so with more inner satisfaction and credit to themselves and their humble parents.

Although not determinative, the parent's employment and financial condition remain proper subjects of inquiry. These may be considered by the court in connection with all the other facts of the case, in determining what disposition will be for the welfare and best interests of the child.

A case in point is *Chua v. Cabangbang,*[81] where the Court examined the financial condition of the petitioner to buttress the controlling and more important finding of abandonment. It said:

> x x x The petitioner has no regular source of income, and it is doubtful, to say the very least, that she can provide the child with the barest necessities of life, let alone send her to school. There is no assurance at all that the alleged father, an unknown quantity, as far as the record goes, would resume giving the petitioner support once she and the child were reunited.

In the *Cervantes* decision, the Court as an aside, also compared the financial standing of the parties. It noted that "the natural mother was not only jobless but also maintains an illicit relation with a married man." It added that "the other party (the adoptive parents) would most likely give her a better future than the former."

It can safely be said that if the parents are of good character, it is enough if they are able to provide the necessities of life and the reasonable requirements of their children. They will not be deprived of custody in order to give it to persons financially able to provide the children with greater comfort. It is enough that the actual needs of the child can be adequately supplied, other factors being equal.

3. LOVE AND AFFECTION

The best interest of the child can be judged to some extent by comparing the acts of the contending parties showing love and affec-

[81] *Chua,* 27 SCRA at 791.

tion for the child and parental interest in his welfare. In this respect, there is a strong presumption, in accordance with the parental preferential rule, that a parent can love the child more and care for him better than anyone else.

The cases of *Flores v. Vda. de Esteban, Medina v. Makabali,* and *Luna v. Intermediate Appellate Court* show how this presumption can be overcome.

In *Flores,* the Court observed that "there already exists mutual love and affection between the grandmother and the child." This was properly considered as a factor among others, to defeat recovery by the father who was almost always absent, of the custody of his child. In *Medina,* the Court relied on the testimony and deportment of the five-year-old child showing the love and attachment that had developed between him and his foster mother. In *Luna,* the natural parents voluntarily surrendered their child to the care of the grandparents when she was only two months old and sought to reclaim custody five years later. The Court also took into consideration the love and affection that had developed between the grandparents and the child as a factor to defeat the parent's right.

a. Sexual and Moral Conduct

As seen from the earlier cases of *Lacson v. San-Jose Lacson* and *Chua v. Cabangbang,* marital infidelity alone does not amount to moral depravity so as to deny a parent custody of the child. Neither does a mother's pregnancy out of wedlock *ipso facto* bring into question her moral fitness. To bar a parent's custodial right, which remains primary and superior, other circumstances such as abandonment or relinquishment of parental rights must be shown.

In *Medina v. Makabali,* the Court wavered in its treatment of this aspect of the parent's moral fitness as it doubted, albeit obiter, "what advantage a child could derive in a home where two adults were living in an adulterous relationship." As if to resolve the Court's doubts as to the impact of such non-marital or extra-marital relationships on the child, a distinction was clearly made in *Unson v. Navarro* "between a child too young to understand, and a child who was already at an age where his or her moral outlook and values may be adversely affected." However, in *Cervantes v. Fajardo,* the extra-and non-marital relationship amounted to moral deficiency so as to result in a severance of parental relationship, even if the child was only a few months old.

It appears that courts have not kept pace with the sexual and moral liberty of the 60's, 70's and the 80's. The later cases show that the child's emotional and moral welfare dictates that custody be denied a parent who maintains an illicit relationship on a permanent basis.

b. Income

The majority view is clear. Financial condition is not *per se* controlling. Our courts do not use income and other material advantages as the sole criterion in determining custody disputes. This is especially true where the party is of good character, can supply a proper home and can provide for the basic needs of the child. It is usually considered by the court in connection with other factors that militate against retention or recovery of custody.

c. Love and Affection

In the cases of *Flores, Medina,* and *Luna,* where the child was allowed by the parent to live with a non-parent from a tender age for a substantial period of time, the courts also took into consideration the fact that affection grows through continued and endearing companionship, and wanes as separation lengthens.

In *Luna,* the Court realized that companionship between the grandparents and the child had blossomed through the years into fondness and personal attachment. To abruptly sever the ties would not serve the best interest of the child.

CONCLUSION

A. Effect on the Natural Right of Parents

The State's avowed interest in any custody proceeding is to entrust the care and custody of the child for the welfare of the child[82]. In pursuit of its obligation to ensure the welfare of the child, the State, through the instrumentality of the courts, can, in a proper case, deny parents custody over their child.[83] It has been said that to ensure the best interest of the child, the power of the state transcends the right of natural parents.[84] This can happen even if it means denying it to

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[82] Henszey, *supra* note 46.

[83] *Id.* at 213.

[84] *Supra* note 10, at 165.

a parent who has in no way been found unfit, or even to one who has expressly been found to be fit.[85]

B. Reconciling the Parental Right Doctrine with the Best Interest Doctrine

Although the parental right doctrine and the best interest of the child doctrine are distinct in theory and not always compatible, in most cases they will lead to the same conclusion. These two approaches are only different ways of emphasizing the same goal – that is, to secure the welfare of the child.

On the one hand, the parental right doctrine espouses that custody of the child should be given to the parent in preference over others if the parent is found to be fit and can supply a proper home.[86] Parents are presumptively regarded as the better custodians in comparison to all others because of the universal concept that there is no substitute for their love and affection. This doctrine, however, does not establish an absolute right. It merely gives the parents a superior claim and a *prima facie* case in their favor.

On the other hand, in the case of the best interest doctrine, there is no longer a preference or presumption in favor of the parents. The parents stand on equal footing with the other party in the custody contest. The role of the court then is to determine the best interest of the child based on the relative fitness and ability of the contending parties in all respects to care for the child.[87] In a stricter application of this doctrine, the rights of even a fit parent must yield when the best interest of the child requires it.[88] The sole inquiry in effect, must be to determine which custodian would serve the best interest of the child.

The reason behind this doctrine is, "it is to presume too much in favor of parents that parental love is universal and immutable like a phenomenon of physical science."[89] In applying this doctrine in a number of cases, our courts recognize as a fact that it would be error

[85] *Id.* at 164.

[86] *Id.* at 163.

[87] *Supra* note 34.

[88] *Id.*

[89] *Celis*, 86 Phil. 554.

to assume that only parents could be capable of disinterested love and affection for the good of the child.[90]

Regardless of which approach is taken, the result intended is the same. The laws and the courts of justice, as *parens patriae*, seek "to respect, enforce, and give meaning and substance to a child's natural and legal right to live and grow in the proper physical, moral, and intellectual environment."[91] Hence, if it is for the best interests of the child, "the court may take the child away from the parents and commit him or her to a benevolent person."[92]

C. Luna v. IAC *is in Harmony with Philippine Jurisprudence*

Thus, in *Luna v. IAC*, custody was awarded to the grandparents even though it meant denying it to parents who were not expressly and categorically found to be unfit.

It must be remembered that two months after the child was born, her parents gave her to the custody of her grandparents and only sought to recover custody five years later. The child had been with her grandparents almost all her life. During the time she resided with them, her grandparents stood in the place of her parents, undertaking all the rights and responsibilites of parents. They provided her not only the primary requisites of life – food, clothing, shelter – but also provided for her psychological and emotional needs.

Her grandparents are her family; to remove her from the environment in which she had lived throughout her life might well disturb her and bring such confusion into her life as to destroy her chances for happiness. The psychological impact of a disruption in the structure of the family she knows and loves may be profound.[93]

Continuity of relationships and familiarity with surroundings and environment are essential for a child's healthy growth.[94] The need to preserve the continuity of relationships is greater whenever the child has formed a psychological attachment to his present custodian.[95]

[90] *Chua*, 27 SCRA 791.

[91] *Luna*, 137 SCRA 7.

[92] Rules of Court, Rule 99, sec. 6.

[93] Henszey, *supra* note 46, at 213.

[94] *Id.*

[95] *Id.*

Disruption in continuity has consequences which can range from food refusals and digestive upsets in very young children to dissocial and delinquent behavior in older children.[96]

D. Luna v. IAC *is in Harmony with Law*

Under Article 229, paragraph 4 of the Family Code, parental authority may be terminated:

> Upon a final judgement of a competent court divesting the party concerned of parental authority.

Since the Court was silent on whether or not there was in fact abandonment, or that the child was treated with cruelty or excessive harshness, which may be the other probable ground, it is submitted that this case falls under the above-quoted ground, a ground which is concededly rather broad and vague.

The Civil Code, which embodied the laws authorizing the termination of parental rights or temporary custody orders in favor of state agencies prior to the Family Code, did not contain a similar provision. It is worthy to note that *Luna* was decided when the Civil Code was still in force. However, as pointed out earlier, this study only seeks to discover whether or not *Luna* is in harmony with present legislation, the Family Code.

In this regard, one should not lose sight of the present concept of parental authority which provides that the rights of the parents to the company and custody of their children is "but ancillary to the proper discharge of their duties to provide their children with adequate support, education and moral, intellectual and civic training and development." Thus, while our law recognizes the right of a parent to the custody of the child, the court has not lost sight of the basic principle that "in all questions on the care, custody, education, and property of children, the latter's welfare shall be paramount."

E. Standards in Philippine Jurisprudence

The cases taken as a whole show that: (1) statutes providing for termination of parental rights are still vague; (2) the natural and due process rights of parents are generally protected; (3) deference

[96] *Id.*

is being shown to the expressed wishes of children of sufficient age and mental capacity; and (4) children have been granted a flexible "right of protection."

More specifically, the following information has been gathered which the courts consider in custody contests. It can be summarized as follows:

1. The right of the parents as against others or the parental preferential rule.
2. The best interest of the child with reference to the following:
   a. Moral character and emotional stability of the parents;
   b. The financial condition of the parents;
   c. The capacity and disposition of the parents to provide love and affection, care and supervision, and other special needs of the child;
   d. The parent's reasons for requesting custody;
   e. The history of their prior responsibility for the care of the child and existing emotional ties; and
   f. Effect of uprooting the child measured by its emotional impact and the adaptability of the child.
3. Consideration of the child's preference, if any, and the reasons.
4. The maternal preferential rule or the tender years rule.

Judges and lawyers have many times characterized custody cases as the most difficult cases they face. The reasons for this are not hard to find. The future lives of children are at stake, imposing heavy responsibilities on all concerned. The cases arise in an atmosphere of strongly felt emotions. Since no two cases are exactly alike, the decisions must be made on a highly individualized basis by the court.

Nearly all judicial discussions of custody cases begin with the statement that custody must be so awarded as to promote the child's best interests. Viewed as a principle, the statement is often criticized as providing no real guidance to the courts and as being difficult to define. A little reflection is enough to reveal, however, that this is not a legal principle in the usual sense, but a statement that when the child's welfare seems to conflict with the claims of one or both parents, the child's welfare must prevail. This can only be done by